Supreme Court, U.S.
FILED
JAN 26 2004
OFFICE OF THE CLERK

No. 03-__031093

In The
Supreme Court of the United States

ROLAND A. SHELTON,

Petitioner,

v.

MARYANN C. SHELTON

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR WRIT OF CERTIORARI

DAVID J. BEDERMAN
Counsel of Record
LARA M. PAIR
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

JONATHAN L. KATZ
Of Counsel
MARKS & KATZ, LLC
1400 Silver Spring Street, Suite 410
Silver Spring, Maryland 20910
(301) 495-4300

GLENN SCHEPPS
Of Counsel
LEAVITT LAW FIRM
229 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 384-3963

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

May state courts enforce divorce property settlements by compelling the remission of funds equivalent to veterans' disability pay, in contravention of federal statutes, 10 U.S.C. § 1408; 38 U.S.C. § 5301, and this Court's ruling in *Mansell v. Mansell*, 490 U.S. 581 (1989)?

LIST OF PARTIES BELOW

The Respondent, as indicated in the caption of the case as reported below, App. 1a, is now known as Maryann C. Mitchell.

TABLE OF CONTENTS

Page

Question Presented for Review ..... (i)
List of Parties Below ..... (ii)
Opinions Below 1
Statement of Jurisdiction 1
Constitutional Provision and Statutes Involved 1
Statement 2

Reasons for Granting the Petition 10

STATE COURTS ARE SHARPLY DIVIDED AS TO THE PROPER TREATMENT OF VETERANS' DISABILITY PAY IN DIVORCE PROPERTY SETTLEMENTS 10

Conclusion 23

TABLE OF AUTHORITIES

CASES

Abernethy v. Fishkin, 699 So. 2d 235 (Fla. 1997) 12, 13
Adams v. Adams, 725 A.2d 824 (Pa.1999) 11
Ashley v. Ashley, 990 S.W.2d 507 (Ark. 1999) 14
Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992) 13
Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) 19
Ex Parte Billieck, 777 So. 2d 105 (Ala. 2000) 14
Ford v. Ford, 783 S.W.2d 879 (Ark. App. 1990) 11
Hapney v. Hapney, 824 S.W.2d 408 (Ark. App. 1992) 15
Hisgen v. Hisgen, 554 N.W.2d 494 (S.D. 1996) 12
Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) 6, 10
In re Marriage of Gaddis, 957 P.2d 1010 (Ariz. App. 1997) 12
In re Marriage of Harris, 991 P.2d 262 (Ariz. App. 1999) 12
In re Marriage of Jennings, 980 P.2d 1248 (Wash. 1999) 11, 13
In re Marriage of Krempin, 83 Cal.Rptr.2d 134 (Cal. App. 1999) 13
In re Marriage of Mansell, 265 Cal. Rptr. 227 (Cal. App. 1989),
cert. denied, 498 U.S. 806 (1990) 11
Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001) 12
Keough v. Keough, 1997 WL 242559 (Va. App. May 13, 1997) 15
Kramer v. Kramer, 567 N.W.2d 100 (Neb. 1997) 13
Krapf v. Krapf, 786 N.E.2d 318 (Mass. 2003) *13*
Mansell v. Mansell, 490 U.S. 581 (1989) ..... *passim*
Matter of the Marriage of Pierce, 982 P.2d 995 (Kan. App. 1999) 14
Matter of the Marriage of Reinauer,
946 S.W.2d 853 (Tex. App. 1997) 15
Matter of the Marriage of Wherrell, 58 P.3d 734 14
McCarty v. McCarty, 453 U.S. 210 (1981) 3, 10
McHugh v. McHugh, 861 P.2d 113 (Idaho 1993) 11, 13
Norman v. Baltimore & Ohio R. Co., 294 U.S. 240 (1935) 19
Owen v. Owen, 419 S.E.2d 267 (Va. App. 1992) 11, 13
Poullard v. Poullard, 780 So. 2d 498 (La. App. 2001) 19
Ridgway v. Ridgway, 454 U.S. 46 (1981) 20
Riley v. Riley, 571 A.2d 1261 (Md. Ct. Spec. App. 1990) 12
Rose v. Rose, 481 U.S. 619 (1987) 6, 10, 16, 20, 21
Steiner v. Steiner, 788 So. 2d 771 (Miss. 2001) 12
Trahan v. Trahan, 894 S.W.2d 113 (Tex. App.1995) 11

Weberg v. Weberg, 463 N.W.2d 382 (Wis. App. 1990) 12
Wright v. Wright, 594 So. 2d 1139 (La. App. 1992) 15

FEDERAL CONSTITUTION AND STATUTES

U.S. Const.
Art. I, § 8, cl. 12 2
Art. I, § 8, cl. 14 2
Art. VI, cl. 2 (Supremacy Clause) 1

10 U.S.C. § 1401 2

Uniformed Services Former Spouses' Protection Act (USFSPA)
10 U.S.C. § 1408 ..... *passim*
10 U.S.C. § 1408(a)(4)(B) 4, 6, 18
10 U.S.C. § 1408(c)(1) 3
10 U.S.C. § 1408(d) 4
10 U.S.C. § 1408(e)(1) 4
10 U.S.C. § 1408(e)(6) 5, 6, 18

10 U.S.C. § 1414 3

28 U.S.C. § 1257 1

Veterans' Benefits Act (VBA)
38 U.S.C. § 1101 2
38 U.S.C. § 1110 2
38 U.S.C. § 1131 2
38 U.S.C. § 5301 ..... 2, 3, 10, 19
38 U.S.C. § 5301(a)(1) 3, 6, 9, 16, 19
38 U.S.C. § 5305 3

National Defense Authorization Act, 1998,
P.L. No. 105-85, 111 Stat. 1629 (1997) 2, 15

National Defense Authorization Act, 2004,
P.L. No. 109-136, 117 Stat. 1392 (2003) 2

Veterans Benefits Act of 2003, P.L. No. 108-183,
117 Stat. 2651 (2003) 20, 21

OTHER MATERIAL

Statement of John Thompson, Acting General Counsel,
Department of Veterans' Affairs,
House Committee on Veterans' Affairs, Aug. 5, 1998,
Garnishment of Veterans Affairs Benefits 16

U.S. Department of Defense,
A Report to Congress Concerning Federal Former
Spouse Protection Laws, Sept. 4, 2001 ..... 4, 15, 16, 17

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Roland A. Shelton, respectfully prays that a writ of certiorari issue to review the October 29, 2003, judgment and opinion of the Supreme Court of Nevada in the above-captioned proceeding.

OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the Nevada Supreme Court of October 29, 2003, styled as *Shelton v. Shelton* (Docket No. 37483), and reported at 78 P.3d 507 (Nev. S.Ct. October 29, 2003), and reprinted at App. 1a. The Nevada Supreme Court's decision came as an appeal of an Order issued by the District Court of Clark County, Nevada, of January 31, 2001, which was unreported, but is reprinted at App. 11a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Supreme Court of Nevada of October 29, 2003. The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition implicates the power of states to override provisions of acts of Congress, in contravention of the Supremacy Clause of Article VI of the federal Constitution. See U.S. CONST. Art. VI, cl. 2 ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

The federal statutes specifically at issue in this case are the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408, the relevant provisions of which are reprinted at App. 15a, as well as the nonattachment and exempt status provisions of the Veterans' Benefits Act (VBA), codified at 38 U.S.C. § 5301, reprinted at App. 24a.

STATEMENT

1. a. In exercise of its powers under the Constitution, U.S. CONST. art. I, § 8, cls.12 (Raise and Support Armies Clause) & 14 (Regulation of Armed Forces Clause), Congress has prescribed a wide array of benefits to the men and women who have served with honor in the United States armed forces. Among these benefits are the retired and retention pay that is rendered to enlisted personnel and officers who serve a statutorily-prescribed period of time on active duty (typically 20 years), and (though retired) are still obliged to comport themselves in accordance with the Uniformed Code of Military Justice and are subject to recall for active duty. See 10 U.S.C. §§ 1401 et seq.

Analytically distinct from retired or retention pay are veterans' disability benefits, including disability pay, which is offered to those present and former service members who have been found by the Veterans Administration to have actually accrued service-related disabilities. See 38 U.S.C. §§ 1101, 1110, 1131 et seq. Up until very recently,[1] a veteran who was eligible

---

[1] See National Defense Authorization Act, 2004, Pub. L. No. 108-136, § 641, 117 Stat. 1392 (2003), which allows a phase-in of full concurrent receipt of military retired pay and veterans disability

for both retired pay and disability compensation was required to elect one or the other. See 10 U.S.C. § 1414; 38 U.S.C. § 5305. Since disability pay, unlike retired pay, is not subject to federal income tax, see 38 U.S.C. § 5301(a)(1); App. 24a, veterans have tended to select the receipt of disability pay.

b. Up until the early 1980's it was a matter of some controversy whether military retired pay was even divisible as a community asset in divorce proceedings involving a former member of the armed forces. In a 1981 decision, this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981), ruled that federal law precluded state courts from dividing military nondisability retired pay pursuant to state community property laws. See id. at 235. This Court made clear in *McCarty* that disability compensation was an entirely different benefit, although subject to the same rules of federal preemption. See id. at 213.

In response to *McCarty*, Congress legislated in 1982 the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408; App. 15a. For the purposes of the present Petition, the crucial provisions of USFSPA concern Congress's grant to state courts of the authority to treat retired pay as property "solely of the [service] member or as property of the member and his spouse in accordance with the law of the jurisdiction. . . ." See 10 U.S.C. § 1408(c)(1); App. 18a. USFSPA by no means required states to treat military retired pay as divisible property, but merely allowed them to do so without any federal preemptive effect, should state community property

---

compensation for certain military retirees. This possibility of concurrent receipts of retirement pay and disability compensation is not otherwise at issue in this case.

or divorce settlement laws so prescribe.[2] In any event, Congress took care in USFSPA to define what "disposable retired pay," id., was subject to division with a former spouse. Among the amounts required to be deducted from total retired pay, in order to calculate disposable retired pay, are any amounts that a veteran was obliged to waive as a condition of receiving disability compensation. See 10 U.S.C. § 1408(a)(4)(B); App. 17a.

An additional feature of USFSPA was an automatic payment procedure by which former spouses could directly receive court-ordered increments or shares of a veteran's retired pay, provided that certain statutory requisites were satisfied by the former spouse. See 10 U.S.C. § 1408(d). In addition, Congress imposed a percentage cap on amounts of a veteran's retired pay that could be directly remitted under this scheme. See 10 U.S.C. § 1408(e)(1); App. 19a. Congress also prescribed a carefully-constructed savings clause to govern situations where state courts ordered remissions of retired pay in excess of the statutory caps applicable to the automatic pay scheme:

> Nothing in this section shall be construed to relieve a [service] member of liability for the payment of alimony, child support, or other payments required by

---

[2] Community property states had traditionally sought to include military retired pay as a marital asset. After USFSPA, most, but not all, of remaining states have, in fact, adopted statutory or common law rules of construction allowing the treatment of military retired pay as a marital asset subject to division upon divorce. See A Report to Congress Concerning Federal Former Spouse Protection Laws, Sept. 4, 2001, Appendix C, available at http://www.dod.mil/prhome/spouserev.html (visited Jan. 17, 2004) [hereinafter "DoD 2001 USFSPA Report"]. This Report was prepared in accordance with the congressional mandate of the National Defense Authorization Act, FY 1998, § 643, Pub. L. 105-85, 111 Stat. 1629 (1997).

> a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid . . .

10 U.S.C. § 1408(e)(6); App. 22a.

c. Any hopes that the enactment of USFSPA would conclusively and completely resolve the status of veterans' retired pay as marital property subject to division at divorce were quickly dashed. Indeed, state courts quickly proved their aptitude in evading USFSPA's restrictions in order to settle additional benefits on the former spouses of service members. Indeed, this Court was obliged in 1989, in *Mansell v. Mansell*, to address virtually the precise issue raised in this Petition: whether state courts "may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits." 490 U.S. 581, 583 (1989). Writing for a majority of the Court (with O'Connor and Blackmun, JJ., dissenting), Justice Marshall concluded that "they may not." Id.

The *Mansell* Court was faced with a state court divorce decree and property settlement that was more ambiguous than the one presented here: Major Gerald Mansell agreed, at the time of his divorce, that his former wife, Gaye Mansell, would receive "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability payments." Id. at 586. Four years later, Major Mansell requested a modification of his divorce decree by removing the provision requiring him to share his total retired

pay with his former spouse. Id. California courts denied his motion, despite his challenge that such a ruling conflicted with both USFSPA and the anti-attachment provision of the Veterans' Benefits Act (at the time of the *Mansell* decision, codified at 38 U.S.C. § 3101(a), and now at id. § 5301(a); App. 24a).

Basing its holding on USFSPA, and declining to reach the nonattachment statute as an independent ground, 490 U.S. at 581 n.6, this Court held that USFSPA specifically preempted a state court's attempt to treat disability pay as a part of a veterans' disposable retired pay, subject to division as part of marital property under that statute. See id. at 588-90 (construing 10 U.S.C. § 1408(a)(4)(B); App. 17a, and id. § 1408(e)(6); App. 22a). The Court reached this conclusion, even as it acknowledged that "Congress, when it passes general legislation, rarely intends to displace state authority" over family law issues, and that this Court "will not find preemption absent evidence that it is ' "positively required by direct enactment"' ." Id. at 587 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and citing *Rose v. Rose*, 481 U.S. 619, 628 (1987)). Indeed, the *Mansell* Court concluded that "[t]he instant case, however, presents one of those rare instances where Congress has directly and specially legislated in the area of domestic relations." Id.

And, unlike the situation in the wake of this Court's decision in *McCarty*, Congress appears to have acquiesced in this Court's construction of USFSPA to the effect that amounts owing to a veteran as disability pay are not subject to being divisible as marital property upon divorce. Despite the fact that Congress has amended USFSPA no less than eight times after the *Mansell* decision was rendered, see App. 22a-23a, in no instance has Congress chosen to disturb that ruling or to otherwise amend the statute in a way material to the issues

raised in this Petition. As will be discussed presently, however, state courts have not been so respectful of this Court's ruling in *Mansell*, necessitating this Petition and this Court's intervention.

2. a. As the Nevada Supreme Court noted, App. 2a-3a, your Petitioner, Roland Shelton and Respondent, Maryann Shelton (now known as Maryann Mitchell), were married on September 1980. Roland served in the United States Navy for more than ten years during the marriage. On January 17, 1997, the Sheltons jointly petitioned for a summary decree of divorce in Clark County, Nevada, District Court. On January 29, 1997, the district court entered a decree of divorce incorporating the parties' joint petition. See App. 13a-14a.

Under the terms of the agreement, the parties designated both Mr. Shelton's military retirement pay and military disability pay as community property, although the agreement awarded all of the disability pay to Mr. Shelton. The parties agreed that Mr. Shelton, individually, would be allotted "half of [his] military retirement pay in the amount of $500 and military disability pay in the amount of $174." App. 13a. Mrs. Shelton would be allotted the other "half of HUSBAND'S military retirement pay in the amount of $577, until her demise." App. 14a. At the time of the divorce, Mr. Shelton had an outstanding military pension of $1,000 per month, and a disability payment of $174 per month based upon a determination that he was ten percent disabled. In the divorce settlement and decree, both spouses waived any right to spousal support. See App. 14a.

Beginning in January 1997, Mr. Shelton regularly made his required payments to his former spouse. In 1999, the Department of Veterans Affairs reevaluated Mr. Shelton's disability status and concluded that he was 100 percent disabled, effective May 1, 1998. Mr. Shelton elected to waive all of his

military retirement benefits for an equivalent amount of disability pay, as federal law allows. Upon receiving notice of an increased disability rating on February 26, 1999, Mr. Shelton ceased his payments to his former spouse under the terms of the divorce decree.

b. Mrs. Shelton then proceeded in November 2000 to enforce the divorce decree, to have cause shown why Mr. Shelton should not be held in contempt, and a claim for judgment. The former Mrs. Shelton asked for half of Mr. Shelton's military pension, or $577, as had been agreed upon before the divorce and as was incorporated in the divorce decree. Mr. Shelton opposed her motion on the grounds that the divorce decree did not allocate any disability pay to her, and that federal law prohibited community property division of veterans' disability benefits. The Clark County District Court denied Mrs. Shelton's motion on the basis of this Court's decision in *Mansell* and also held that federal law prevented states from treating military disability pay as divisible community property. See App. 12a. The district court also refused to grant Mrs. Shelton equitable relief for the loss of her $577 monthly income on the basis that it lacked jurisdiction to hear a request for alimony when alimony had been waived in the final divorce decree. Id.

c. On appeal, the Nevada Supreme Court reversed, concluding that "[a]lthough states are precluded by federal law from treating disability benefits as community property, states are not precluded from applying state contract law, even when disability benefits are involved." App. 10a. In reaching this result, the Nevada Supreme Court explicitly rejected the argument that when Mr. Shelton elected to receive full disability pay in lieu of retired pay that, this Court's decision in *Mansell* required that any amounts so waived would not be subject to division with his former spouse. App. 5a.

The Nevada Supreme Court thus held, relying on a variety of state supreme court and state appellate decisions:

> Based on the cases decided after *Mansell*, we do not agree [that *Mansell* dictates a result in favor of Mr. Shelton].
>
> Many courts have determined that a recipient of military disability payments may not deprive a former spouse of marital property. The courts proceed under various theories, but the underlying theme is that it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay. Although states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved.

App. 5a-6a (citations omitted).

In short, the Nevada Supreme Court ruled that state law principles of contract law, see App. 7a-9a, permit a state court to order the payment of a veteran's disability benefits to a former spouse, despite the statutory provisions of USFSPA and the antiattachment clause of the Veterans' Benefits Act,[3] and this Court's ruling in *Mansell*.

---

[3] The effect of 38 U.S.C. § 5301(a), was briefed by the parties and mentioned by the Nevada Supreme Court. See App. 6a n.13.

REASONS FOR GRANTING THE PETITION

STATE COURTS ARE SHARPLY DIVIDED AS TO THE PROPER TREATMENT OF VETERANS' DISABILITY PAY IN DIVORCE PROPERTY SETTLEMENTS

This Petition calls for the Court to reconsider the nettlesome connection between federal statutes governing the disposition of federal veterans' benefits and the traditional authority of state courts over the making and enforcement of property settlements arising from divorce. This issue has required the Court's attention on a number of occasions in the last quarter-century, see, e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), *McCarty v. McCarty*, 453 U.S. 210 (1981); *Rose v. Rose*, 481 U.S. 619 (1987); and *Mansell v. Mansell*, 490 U.S. 581 (1989).

It requires this Court's review now because state supreme courts and appellate courts are in manifest division as to the proper construction of the relevant federal statutes involved here – the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408; App. 15a, and the nonattachment provision of the Veterans' Benefits Act (VBA), 38 U.S.C. § 5301; App. 24a. In addition, state courts – including the Nevada Supreme Court in the decision for which review is sought here; see App. 5a-6a – are clearly unsettled as to the preemptive effect that federal benefits statutes should have on the contractual enforcement of state law divorce property settlements. Finally, many state courts appear to be either in open defiance of this Court's earlier ruling in *Mansell*, or (at a minimum) striving mightily to develop untenable and problematic ways to distinguish this Court's holding that USFSPA preempts state

laws that have the effect of devolving on a former spouse funds that are attributable to a veteran's receipt of disability pay. See 490 U.S. at 583, 594-95

1. There are a number of lines of fracture in state court decisions dealing with the proper application of federal veterans' benefits statutes in enforcement of divorce property settlements.

a. One set of these divisions are frankly noted by the Nevada Supreme Court, App. 5a-6a, insofar as it observed that many state courts have held, notwithstanding *Mansell*, "that a recipient of military disability payments may not deprive a former spouse of marital property. The courts proceed under various theories, but the underlying theme is that it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay." Id. (citing *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Cal. App. 1989), cert. denied, 498 U.S. 806 (1990); *Ford v. Ford*, 783 S.W.2d 879 (Ark. App. 1990); *McHugh v. McHugh*, 861 P.2d 113 (Idaho 1993); *Adams v. Adams*, 725 A.2d 824 (Pa.1999); *Trahan v. Trahan*, 894 S.W.2d 113 (Tex. App.1995); *Owen v. Owen*, 419 S.E.2d 267 (Va. App. 1992); *In re Marriage of Jennings*, 980 P.2d 1248 (Wash. 1999)). Employing these same precedents from other jurisdictions, the Nevada Supreme Court concluded that "states are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved." Id.

b. Another set of state court decisions have specifically confronted this Court's ruling in *Mansell* and sought to limit or distinguish it. Some courts have sought to constrain *Mansell* to its facts. After all, Major Mansell was already receiving disability benefits at the time of the dissolution of his

marriage; any attempt to divide disability pay as a marital asset would clearly violate USFSPA. See 490 U.S. at 585. But, according to some state courts, *Mansell*'s facts did not ostensibly speak to the situation where a veteran later decides to forego additional retirement pay in favor of disability pay. Some state courts have seized on this factual nuance as the basis of authority to quantify with certainty the former spouse's interest in a veteran's retired pay, which the former service member is not permitted to frustrate by subsequently voluntarily waiving retired pay.[4] See *Hisgen v. Hisgen*, 554 N.W.2d 494, 497-98 (S.D. 1996); *Abernethy v. Fishkin*, 699 So. 2d 235, 239-40 (Fla. 1997); *In re Marriage of Gaddis*, 957 P.2d 1010, 1013 (Ariz. App. 1997); *In re Marriage of Harris*, 991 P.2d 262, 266 (Ariz. App. 1999); *Johnson v. Johnson*, 37 S.W.3d 892, 896-97 (Tenn. 2001). This may well characterize the approach of the Nevada Supreme Court here, given its construction of the divorce property settlement between the parties. See App. 8a-9a; see also App. 13a-14a.

In other cases, state courts have enforced divorce decrees or property settlements which provided that the military spouse could take no action to diminish his or her retired pay, and would indemnify the non-military spouse for any such

---

[4] Other state courts have noted that *Mansell* was decided in he context of a community property state and that its ruling should not affect a state court's decision to award alimony out of a veteran's disability pay. See, e.g., *Steiner v. Steiner*, 788 So. 2d 771, 778 (Miss. 2001); *Riley v. Riley*, 571 A.2d 1261, 1265 (Md. Ct. Spec. App. 1990); *Weberg v. Weberg*, 463 N.W.2d 382, 384 (Wis. App. 1990). Since Petitioner and Respondent mutually disclaimed alimony or spousal support in their divorce decree, see Pet. App. 14a, this issue is not raised here.

diminution.[5] See *Abernethy*, 699 So.2d at 239-40; *Owen*, 419 S.E.2d at 269-71. Some courts have taken the same approach even without an express indemnity agreement. See *McHugh*, 861 P.2d at 115. Still other state courts have held that the waiver of retirement pay with a reduction in pension payments to the non-military spouse was a change in circumstances, which permitted redistribution of marital property or reassessment of support payments. See *In re Marriage of Jennings*, 980 P.2d at 1254-55; *Kramer v. Kramer*, 567 N.W.2d 100, 113 (Neb. 1997); *Clauson v. Clauson*, 831 P.2d 1257, 1261-64 (Alaska 1992). Yet other courts have held that if the military retiree waives retired pay to receive disability benefits, the state courts have the equitable power to impose a resulting trust on the money received as disability payments. See *Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003); *In re Marriage of Krempin*, 83 Cal.Rptr.2d 134, 143 (Cal. App. 1999).

While these state courts have taken slightly different approaches, each achieved a doctrinal end-run around *Mansell*. The common thread in these and other similar cases is the central concept that the nonmilitary former spouse has an inchoate interest in the military retiree's retired pay that can be fixed at the time of divorce, which the retiree should not and will not be permitted to affect. Where the veteran seeks to elect the receipt of disability pay, these state courts have ruled that, notwithstanding *Mansell*, they are at liberty to modify divorce property settlements to require the effective transfer of a portion of a veteran's disability benefits to a former spouse.

c. But the courts in other jurisdictions have been more respectful of this Court's rulings, resisting the temptation

---

[5] No such indemnification clause appears in the divorce decree in this case. See App. 13a-14a.

to limit or distinguish *Mansell* to the vanishing point, and to blithely override the preemptive effect of USFSPA. In *Ex parte Billieck*, 777 So. 2d 105 (Ala. 2000), the Alabama Supreme Court held that USFSPA's definition of disposable retired pay, 10 U.S.C. § 1408(a)(4); App. 17a, and this Court's ruling in *Mansell*, ineluctably led to the conclusion that state courts could not modify a divorce property settlement by requiring a veteran to remit disability pay to a former spouse, even where the veteran had agreed (at the time of divorce) to pay a certain percentage of retirement pay which was later foregone in favor of disability pay. See id. at 106-09. See also *Ashley v. Ashley*, 990 S.W.2d 507, 508-09 (Ark. 1999) (to the same effect).

Kansas courts have reached substantially the same conclusion. In *Matter of the Marriage of Pierce*, 982 P.2d 995 (Kan. App. 1999), the Kansas Court of Appeals ruled that

> *Mansell* makes it perfectly clear that the state trial courts have no jurisdiction over disability benefits received by a veteran. The trial court in this case cannot order Douglas to change the payments back to retirement benefits, and it cannot order him to pay his disability benefits to Priscilla. We conclude the court may not do indirectly what it cannot do directly.

Id. at 998. In a subsequent decision, the Kansas Supreme Court adopted this approach, although ruling that how to characterize a particular veteran's benefits as either retired pay or disability pay, within the meaning of USFSPA's exclusion clause, 10 U.S.C. § 1408(a)(4)(c), App. 17a, was sometimes a difficult factual matter. See *Matter of the Marriage of Wherrell*, 58 P.3d 734, 737-41 (Kan. 2002).

Other state intermediate appeals courts have likewise held that the proper interpretation of USFSPA, as construed by *Mansell*, is that divorce decrees cannot be modified in order to

transfer a veteran's disability benefits to a former spouse, even where a service member had agree to share a portion of retirement pay that was later waived to receive disability pay. See *Hapney v. Hapney*, 824 S.W.2d 408 (Ark. App. 1992); *Wright v. Wright*, 594 So. 2d 1139, 1140 (La. App. 1992); *Matter of the Marriage of Reinauer*, 946 S.W.2d 853, 858-59 (Tex. App. 1997); *Keough v. Keough*, 1997 WL 242559 (Va. App. May 13, 1997).

2. a. This widely disparate treatment of disability pay in modifications sought to divorce property settlements involving waived retired pay has not gone unnoticed by the federal agencies charged respectively with the disbursement of veterans' retired pay and of disability pay, the Departments of Defense and Veterans Affairs, respectively. In the September 2001 Report prepared by the Department of Defense, at the request of Congress in section 643 of the National Defense Authorization Act, FY 1998, Pub. L. 105-85, 111 Stat. 1629 (1997), it was noted that

> Congress has, on several occasions, chosen to give VA disability compensation a higher priority than payments to former spouses. This is consistent with the treatment historically provided by Congress to VA disability compensation. It has treated it as compensation owed to the member for injuries/wounds incurred in the service of the United States. As such, the Congress has always exempted it from the claims of creditors (it has allowed claims for spousal and child support).

DoD 2001 USFSPA Report, supra note 2, at 3, 81-82. The Department of Defense observed that state courts had given widely variant treatment to disability pay when enforcing an earlier divorce property settlement that involved waived retired pay, see id. at 52-54 (citing an American Bar Association's

April 13, 1999, responses to DoD's inquiries, at 11-12, found at http://www.abanet.org/family/military/nda98.html (last visited Jan. 18, 2004)), and that this would either have to be addressed by Congress or this Court. In any event, the Department of Defense turned aside suggestions that it should institute regulations that would allow the payment of veterans' disability pay to former spouses. It found that this would be a clear contravention of USFSPA, and such a radical change in the law would have to be a matter addressed, in the first instance, by the Veterans Administration, or by Congress. See id. at 82.

Likewise, the Veterans Administration has indicated that, pursuant to this Court's decision in *Rose v. Rose*, 481 U.S. 619 (1987) (allowing state courts to set child support obligations at levels that veterans would necessarily have to use disability pay to satisfy them), it will allow a garnishment of disability compensation received in lieu of retirement pay to satisfy court-ordered child support, consistent with the nonattachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301(a). See Statement of John Thompson, Acting General Counsel, Department of Veterans' Affairs, House Committee on Veterans' Affairs, Aug. 5, 1998, *Garnishment of Veterans Affairs Benefits*, available at http://www.va.gov/OCA/testimony/5AG98AGC_usa.htm (visited Jan. 18, 2004)). Somewhat more controversial was the application of such garnishment for the satisfaction of alimony or spousal support orders, but the VA has apparently been permitting such. See id. The Veterans Administration will not, however, permit the attachment of disability pay as part of a divorce property settlement. See id.

According to these pronouncements by the relevant federal agencies, it seems clear that the root cause of the widely discordant treatment of veterans' disability pay in state divorce property modification proceedings is not any lack of guidance

by the relevant federal statutes on point – USFSPA and the antiattachment provision of the VBA – but, rather, the failure of state courts to give the proper preemptive effect to these laws. That such confusion should persist even after this Court's decision in *Mansell*, with its express holding that USFSPA's treatment of disability pay preempts contrary state law even under the most stringent preemption standards, see 490 U.S. at 587, is deeply troubling and requires this Court's attention.

b. Petitioner needs hardly speculate as to the number of individuals who are potentially affected by this trend in the case law. According to the DoD 2001 USFSPA Report, supra note 1, at 19, as of April 1, 1999, 1.985 million former service members are receiving retired pay. Assuming even moderate divorce rates and a robust cohort of veterans (a large percentage of which may not have yet been rated for disability), that leaves a large pool of male and female veterans who may find themselves in the situation presented in this case. Indeed, the 2 million figure surely undercounts the potential class of litigants here, insofar as it excludes those still in the service (and thus not drawing retired or disability pay), even though they may already be divorced and subject to a divorce decree with a property settlement which stipulates as to a future division of retired pay.

3. Even if state courts were unanimous in their holdings that USFSPA does not preempt state contractual enforcement of divorce property settlements involving the division of retired pay later supplanted by disability pay, Petitioner would still refer this issue to the Court's attention in light of its previous ruling in *Mansell*. But state courts have by no means reached such a consensus, and, indeed, as indicated above, have sharply split as to whether such modification proceedings are permissible, and, even if so, under what legal theories they may proceed. The split in state court jurisprudence has not narrowed over time; it

has continued to grow.

Likewise, Petitioner believes this is a suitable case for the Court to accept to resolve this matter. The relevant provisions of the divorce decree between the parties, App. 13a-14a, are standard. There was no indemnification provision by which a veteran undertakes to compensate a former spouse in the event the veteran seeks to elect disability pay in lieu of retired pay. As even acknowledged by the Nevada Supreme Court, see App. 8a, the Petitioner did not purport in the divorce decree to allocate any part of his existing disability pay to the Respondent. Finally, this case does not involve a modification of alimony payments, as both parties to the divorce decree disclaimed any spousal support. See App. 14a. Simply presented here is the question of whether a state court can, under any legal theory, and consistent with federal law and this Court's ruling in *Mansell*, require a veteran to remit a portion of disability pay in compensation for waived retired pay.

4. a. Without unnecessarily broaching the merits of this issue, Petitioner would merely remark at this stage that this question is settled by the same sensible construction of USFSPA made already by this Court in *Mansell*. Congress has already spoken to the definition of "disposable retired pay" subject to division under USFSPA, 10 U.S.C. § 1408(a)(4)(B); App. 17a, by expressly excluding disability pay from such calculations. Likewise, the savings clause that Congress provided in USFSPA as grounds for state courts to exceed the statutory caps on the automatic remission of retired pay to former spouses, 10 U.S.C. § 1408(e)(6); App. 22a, does not give state courts carte blanche to treat disability pay as retired pay. See *Mansell*, 490 U.S. at 588-90. The relevant provisions of USFSPA have not changed since this Court's decision in *Mansell*. It would stretch the canons of statutory construction too far to suggest, as the court below appears to, see App. 6a, that what was found preempted

under one statutory scheme is not later to be regarded as preempted under the same scheme.

Nor can it seriously be entertained that state courts' reliance – as in the Nevada Supreme Court decision here, see App. 6a-8a (citing *Poullard v. Poullard*, 780 So. 2d 498, 499-500 (La. App. 2001)) – on principles of state contract law to enforce divorce decrees can prevail over a preemptive federal interest. See *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-23 (1986) ("'Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.' If the regulatory statute is otherwise within the powers of Congress, therefor, its application may not be defeated by private contractual provisions.") (quoting *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308 (1935)).

b. The Nevada Supreme Court's supposition that "'nothing in either the state or federal law prevents a person from agreeing to give a part of his disability payment to another'," App. 7a (quoting *Poullard*, 780 So. 2d at 499-500), is manifestly contradicted by the relevant provisions of the Veterans' Benefits Act, 38 U.S.C. § 5301, which provides that "[p]ayments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be . . . exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Id. § 5301(a)(1). And, if this was not enough,

Congress has recently amended the VBA and this applicable provision, to

> clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension or dependency and indemnity compensation, as the case may be. . . such agreement shall be deemed to be an assignment and is prohibited.

Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, to be codified at § 5301(a)(3)(A).

Petitioner would thus submit that, in addition to the issues raised under USFSPA, this case is an appropriate vehicle for the Court to revisit the proper construction of the VBA. And while the Nevada Supreme Court was clearly cognizant of the VBA, see App. 6a n.13, it chose to ignore it in its ruling that no federal statute prevents a contractual assignment of veterans' disability pay. Petitioner is mindful that the VBA issue may well turn on this Court's earlier decisions in *Rose*, 481 U.S. at 630-33 (allowing attachment of disability pay to satisfy child support obligations), and *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (rejecting state court's disposition of a veterans' life insurance policy benefits as either marital property or a constructive trust). And although the logic of the *Rose* decision on the VBA's antiattachment clause drew but a bare majority of this Court's members (with O'Connor, Stevens and Scalia, JJ. writing or joining concurrences), the holding was narrowly drafted to cover only child support obligations, and appeared to specifically exclude alimony or spousal support payments or any general attempt to characterize veterans' benefits as marital

property divisible upon divorce.

Petitioner would maintain before this Court that it would stretch the VBA's antiattachment provision too far to allow state court modifications of divorce property settlements by transferring disability pay to former spouses. Given the wide array of veterans' benefits (not just disability pay), and the broad range of circumstances in which these can become encumbered with debt or contractual obligations, this Court's guidance may well be necessary to avoid a wholesale erosion of veterans' benefits through a variety of attachment schemes. Just as Congress has made clear in USFSPA that disability pay is not to be treated as a form of retired pay subject to division with former spouses, there is no indication that Congress has intended that disability pay be made available to satisfy the claims of former spouses in divorce property settlements. Cf. *Rose*, 481 U.S. at 631 ("state contempt proceedings to enforce a valid child support order coincide[s] with Congress' intent to provide veterans' disability compensation for the benefit of both appellant and his dependents."). Indeed, if anything, Congress appears to be as concerned as ever in strengthening the VBA's antiattachment provision to cover the circumstances raised in this case. See Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, to be codified at § 5301(a)(3)(A).

c. This case presents an opportunity for the Court to not only clarify the relevant standards of preemption that apply where federal veterans' benefits protections apparently conflict with state divorce property settlement standards, but also to conclusively settle the effect of USFSPA and VBA where state courts purport to award disability pay in the guise of enforcing earlier divorce decrees granting portions of retired pay. Additionally, this Court can delimit the precise scope of its earlier ruling in *Mansell*, and either announce to

state courts that they must faithfully adhere to it or are free to continue experimenting in limiting and distinguishing that holding. Lastly, and not to be discounted, this Court would have the opportunity to declare a coherent and consistent rule of construction for USFSPA and VBA in cases involving the disposition of disability pay, potentially affecting tens of thousands of veterans and their former spouses attempting to manage their respective financial affairs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
LARA M. PAIR
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

JONATHAN L. KATZ
Of Counsel
Marks & Katz, LLC
1400 Silver Spring Street; Suite 410
Silver Spring, Maryland 20910
(301) 495-4300

GLENN SCHEPPS
Of Counsel
Leavitt Law Firm
229 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 384-3963

Attorneys for Petitioner

January 23, 2004